UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS DENIED: July 28, 2011

CBCA 2260

URS ENERGY & CONSTRUCTION, INC.,[1]

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Daniel R. Frost and Claire Y. Dossier of Snell & Wilmer L.L.P., Denver, CO, counsel for Appellant.

Brady L. Jones, III, Sky M. Smith, and Kaniah W. Konkoly-Thege, Office of Legal Services, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **SHERIDAN**.

SOMERS, Board Judge.

URS Energy & Construction, Inc. (URS) has appealed a contracting officer's decision denying its claim for reimbursement of an indemnity obligation incurred pursuant to a

[1] Appellant advises that, due to a typographical error, URS Engineering and Construction was referenced in the notice of appeal as the contractor. Apparently, that entity does not exist. The actual name of the contractor is URS Energy & Construction, Inc., as is reflected on corporate change of name documents submitted by appellant in support of its response to respondent's motion to dismiss. The caption is hereby amended to reflect the correction.

supersedeas bond. The Department of Energy (DOE or the Government) has filed a motion to dismiss this appeal for lack of jurisdiction and for failure to state a claim upon which relief may be granted. For the reasons set forth below, we deny the motion on both grounds.

Background[2]

Novation of the Contract and Name Change

Pursuant to the Uranium Mill Tailings Radiation Control Act of 1978, Public Law 95-605, DOE is responsible for remediation at twenty-four inactive uranium mill tailings sites (mill sites) and properties near these sites that are contaminated with residual radioactive materials (mill tailings). In 1983, DOE entered into a cost-reimbursement contract with Morrison-Knudsen Company, Inc. (Morrison-Knudsen). The contract, issued through DOE's Uranium Mill Tailings Remedial Action (UMTRA) Project Office, called for Morrison-Knudsen to perform engineering, design, construction, and inspection services necessary to accomplish remedial and cleanup tasks at contaminated sites. The parties refer to the contract as the UMTRA contract.

On January 2, 1986, Morrison-Knudsen entered into a novation agreement which called for a second company, MK-Ferguson Company (MK-Ferguson), to assume all duties and liabilities associated with the UMTRA contract. By letter dated January 28, 1986, the companies asked the Government to recognize MK-Ferguson as the successor-in-interest on the contract, and provided DOE with signed copies of the novation agreement and supporting documents.

By bilateral contract modification issued in June 1986, the parties agreed to change the contractor's name in accordance with the January 2, 1986, novation agreement. The modification stated that "[e]ffective January 2, 1986, all references to Morrison-Knudsen Company, Inc. in contract DE-AC04-83AL18796 are hereby deemed to be reference to MK-Ferguson Company." As a result, MK-Ferguson performed tasks as assigned, and the Government paid MK-Ferguson for the tasks as performed.

In July 2000, MK-Ferguson changed its name to Washington Group International, Inc. (Washington Group), while maintaining the same corporate structure and identity. Following

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[2] These facts are taken primarily from the first amended complaint, the exhibits attached thereto, and first and supplemental declarations submitted by Brady L. Jones, III, counsel for DOE, together with the exhibits submitted in support of the declarations.

the name change, Washington Group continued to perform as required under the UMTRA contract and DOE made payments directly to Washington Group for the work.

On February 25, 2010, Washington Group changed its name to URS Energy & Construction, Inc. (URS). On that date, DOE and Washington Group executed a change of name agreement. Pursuant to the agreement, the Government recognized URS as the same entity as Washington Group.

To avoid confusion based upon the various changes of name of the contractor, we refer to appellant for the remainder of this opinion as either URS or appellant, regardless of the official name at the time of reference.

Subcontractor Litigation

In February 1995, URS awarded a subcontract to Ground Improvement Techniques, Inc. (GIT) to perform a task assignment under the UMTRA contract. In September 1995, URS terminated GIT for default. DOE knew about and agreed to the termination. URS filed suit against GIT, with DOE's permission, and GIT countersued. In 1996, the jury ruled against URS and awarded GIT a substantial judgment. DOE instructed URS to appeal the judgment.

As a condition of staying enforcement of the judgment pending appeal, the United States District Court in Colorado required URS to provide a surety bond (known as a supersedeas bond). Thereafter, URS executed certain agreements of indemnity, pursuant to which URS agreed that, should the bond surety company incur liability on the bond, URS would reimburse the company. URS paid premiums for the bond. URS routinely invoiced DOE for the bond premiums and DOE tendered payment on the bond until August 31, 2006. After that date, DOE paid no further premiums.

Meanwhile, in May 2001, URS filed for Chapter 11 bankruptcy in the United States Bankruptcy Court, Reno, Nevada. URS identified as a debt the judgment issued by the district court (still on appeal). On December 21, 2001, the bankruptcy court confirmed URS's plan for reorganization. The parties dispute whether the bankruptcy court's action discharged any debts. URS contends that it did not. DOE asserts that the action released URS from liability for GIT's claims and the federal district court's judgment.

In January 2002, URS and the surety entered into a new indemnity agreement. DOE contends that the indemnity agreement resurrected URS's liability for bonds in existence prior to the execution of the indemnity agreement, including the bond at issue here, thus renewing an obligation that had been released through bankruptcy.

The United States Court of Appeals for the Tenth Circuit vacated the 1996 judgment and ordered a new trial on damages. On remand the district court held a second trial, beginning on May 8, 2006. On retrial, the second jury awarded damages against URS. At the conclusion of the second trial, GIT sought entry of judgment based on that verdict against both URS and the surety. The district court determined that the bond remained valid and entered judgment against URS and the surety based on the verdict in the second trial.

URS and the surety appealed portions of the district court's judgment, including the portion relating to the determination that the bond remained valid. URS advised DOE of its intent to appeal. This time, however, DOE did not consent to the appeal.

The Tenth Circuit reduced the 2006 judgment by several million dollars, but ruled that the bond remained valid. In January 2009, on remand, the district court issued a judgment against URS and the surety, awarding all costs to GIT. The judgment expressly stated that all costs awarded to GIT were "all found reasonable, allowable, and allocable pursuant to the Federal Acquisition Regulations (FAR)." The surety paid the judgment, and URS compensated the surety for the payments.

URS alleges that by paying part of the judgment via its indemnity obligation to the surety, URS has incurred a cost deemed by FAR 31.204(a) to be reasonable, allowable, and allocable. On November 6, 2008, URS submitted an invoice to the contracting officer, seeking payment of $7,799,049.19, the amount paid in order to satisfy the judgment issued by the district court.

By letter dated January 11, 2010, the contracting officer denied URS's request for reimbursement. The contracting officer determined that no specific clause in the contract authorized reimbursement of the indemnity obligation, and rejected URS's contention that the general cost reimbursement provisions of the contract apply.

By letter dated January 22, 2010, URS submitted a certified claim, seeking, among other things, "the amount URS has paid as a result of delays and damages caused by DOE on the Slick Rock Project and for amounts incurred to procure the Bond and then indemnify URS's surety." By letter dated March 22, 2010, the contracting officer rejected the claim on two grounds. First, the contracting officer found that URS did not "identify" its claim of delay and damages that DOE allegedly caused it during the Slick Rock project. Second, the contracting officer determined that URS had never presented delay or damages claims to the contracting officer prior to submitting the certified claim.

By letter dated April 8, 2010, URS explained that the mention of "damages and delays" in the certified claim referred to the appellate decision, the underlying judgment

awarding GIT damages, and the cost incurred by URS that was ultimately used to partially satisfy the judgment. URS confirmed that the certified claim had not changed, and sought payment of the amount originally billed through the November 6, 2008, invoice. URS requested the contracting officer to issue a final decision on the certified claim.

On October 18, 2010, the contracting officer issued a final decision denying the claim. The contracting officer determined that the indemnity obligation could not be considered a contract cost, stating:

> Prior to executing the January 24, 2002 indemnity agreement, [URS] was released from liability for the GIT judgment relating to the termination for default lawsuit against GIT during its bankruptcy. It was therefore no longer liable for any contract costs (including termination for convenience costs) associated with the GIT Subcontract. This also cuts off any potential DOE reimbursement for contract costs associated with that contract. [URS]'s decision to reaffirm the FIC [Federal Insurance Company] debt for its own bonding purposes was a decision it made to stay in business, not a cost incurred or related to the GIT Subcontract or the 1983 [Morrison-Knudsen] contract. All such potential costs were terminated by the bankruptcy proceedings. Reimbursement of [the contractor's] indemnity obligation to FIC for [URS] is therefore not allowable as a reimbursable cost under the 1983 [Morrison-Knudsen] contract and FAR Subpart 31.201-2.

Contracting Officer's Final Decision, at 3, appended to the Notice of Appeal. URS timely filed its notice of appeal on January 10, 2011.

Discussion

DOE presents two alternative challenges to the Board's jurisdiction. First, it maintains that the entity filing the appeal, initially and apparently erroneously identified as URS Engineering and Construction Co., Inc. (which, as explained in footnote 1, is a misspelling of the true entity, URS Energy & Construction, Inc.) failed to demonstrate that it is a real party in interest as required under the Contract Disputes Act, because it was not a party to the contract. Second, DOE contends that even if URS could be construed as a party to the contract, appellant had failed to state a claim upon which relief could be granted. DOE posits that even though URS alleged that the invoice upon which the claim is based is

due and payable, URS's failure to allege that DOE had failed to pay the invoice made the claim fatally defective.

On these motions, appellant bears the burden of establishing subject matter jurisdiction by a preponderance of the evidence. *Ron Anderson Construction, Inc. v. Department of Veterans Affairs*, CBCA 1884, et al., 10-2 BCA ¶ 34,485, at 170,070. In assessing whether the Board has subject matter jurisdiction, the allegations of the complaint must be construed favorably to the pleader. *Id*. When a motion to dismiss for lack of subject matter jurisdiction challenges the truth of the alleged jurisdictional facts, the Board may consider relevant evidence beyond the pleadings to resolve disputed facts. *Rockies Express Pipeline LLC v. Department of the Interior*, CBCA 1821, 10-2 BCA ¶ 34,542, at 170,355; *Ron Anderson*.

In response to the motion to dismiss, first, URS filed an amended complaint (which has been accepted by the Board by order dated March 18, 2011), correcting the name of appellant to URS Energy & Construction, Inc. Next, in its opposition to the motion to dismiss, URS asserted -- incorrectly as it explains in a subsequent submission -- that URS is the same entity as the original contractor (Morrison-Knudsen), but had simply changed its name. As to DOE's second assertion that URS had failed to allege that DOE had failed to pay the invoice, URS points to paragraph 53 of its first amended complaint, which expressly states that DOE failed to pay the invoice.

In its reply, DOE continued to dispute that URS could be the successor to Morrison-Knudsen, and submitted additional documents. URS filed a surreply with the Board's permission. Relying upon the documents submitted by DOE, URS pointed to the novation agreement and other documents. Based upon those documents, and, after further investigating its own corporate history, URS realized that it was not actually the same entity as Morrison-Knudsen. Morrison-Knudsen did indeed sign the original contract. Subsequent to this, URS's predecessor, although not the original signatory to the contract, properly assumed the contract with DOE's permission through the novation agreement, and became the prime contractor.

In light of the facts presented by the parties, we need not spend much time on the issue of whether URS is the proper contractor. The Board's jurisdiction derives from the Contract Disputes Act (CDA), 41 U.S.C.A. §§ 7101-7109 (West Supp. 2011). The CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision." *Id*. § 7103(a). The CDA defines a "contractor" as "a party to a Federal Government contract other than the Federal Government." *Id*. § 7101(47); *see also Wackenhut International, Inc. v. Department of State*, CBCA 1235, 09-2 BCA ¶ 34,255.

We are not dealing here with an attempt by a subcontractor, surety, or one party to a joint venture to pursue an appeal . URS is the successor of Morrison-Knudsen, the original prime contractor, by an assignment and a series of name changes that were implicitly or explicitly approved by the Government. Based upon the above facts, we deny DOE's motion to dismiss and find that URS is the prime contractor under this contract and, as such, is the proper entity to present a claim.

Next, we address DOE's motion to dismiss for failure to state a claim. The law is clear that a motion to dismiss for failure to state a claim will be granted only when the facts asserted by the appellant do not entitle it to a legal remedy. We assume that all well-pled factual allegations plausible on their face are true and indulge all reasonable inferences in favor of the non-movant. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Océ North America, Inc. v. Department of Health and Human Services*, CBCA 2115, 11-1 BCA ¶ 34,677; *Blackstone Consulting, Inc. v. General Services Administration*, CBCA 718, 08-1 BCA ¶ 33,770.

DOE states that "appellant makes no attempts [sic] to support its conclusion or even allege in Count 1 that Respondent has failed to pay the invoice." However, in the certified claim presented to the contracting officer, URS states that "under the terms of its contract with DOE, URS is clearly entitled to payment from DOE for that amount." In the contracting officer's final decision, the contracting officer stated that "reimbursement of [URS]'s indemnity obligation to FIC [the surety] . . . is therefore not allowable as a reimbursable cost under the 1983 [contract] and FAR Subpart 31.201-2." Finally, the first amended complaint alleges that DOE failed to pay the contractor the costs sought as identified in the invoice.

Assuming that the facts as alleged by URS are true, as we must for the purpose of ruling on the motion, URS has presented at least a cogent basis for recovery. URS alleges that the contract required DOE to reimburse it for its indemnity obligation to its surety. URS contends that DOE did not do so. This allegation is sufficient to withstand a motion to dismiss for failure to state a claim. The motion to dismiss is denied.

Decision

For these reasons, the motion to dismiss the appeal for lack of jurisdiction and for failure to state a claim is **DENIED.**

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JERI KAYLENE SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

PATRICIA J. SHERIDAN
Board Judge